UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARCHER DANIELS MIDLAND COMPANY (ADM),

and **Cases 25–CA–143250**
25–CA–145578
BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS INTERNATIONAL UNION, AFL–CIO, CLC LOCAL 103-G **25–RC–142796**

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for the General Counsel.
Joseph E. Tilson, Esq. and
Jeremy J. Glenn, Esq.,
for the Respondent.
Dennis Howard,
for the Charging Party.

DECISION AND REPORT ON OBJECTIONS

MELISSA M. OLIVERO, Administrative Law Judge. These combined unfair labor practice and representation cases arise out of a union representation campaign that resulted in the Union's defeat by a margin of 5 votes. The cases were tried in Peoria, Illinois on July 23 and 24, 2015. The General Counsel alleges that Respondent committed several violations of Section 8(a)(3) and (1) and Section 8(a)(1) of the National Labor Relations Act (Act). GC Exh. 1(i). As discussed herein, I find merit to most of these allegations.

Moreover, the Union alleges that its objections to Respondent's conduct during the election campaign should be sustained, the election set aside, and a new election ordered. As discussed herein, I sustain two objections and recommend that election be set aside and a new election ordered.

STATEMENT OF THE CASES

On December 15, 2014,[1] the Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL–CIO, CLC Local 103-G (Union) filed a representation petition with the National Labor Relations Board (Board) indicating substantial employee support for its efforts to be certified as the representative of a bargaining unit of maintenance employees at the Decatur, Illinois Bio Products facility of Archer Daniels Midland Company (ADM) (Respondent or Employer). The petition was docketed by the Board as Case 25–RC–14296. The parties entered into a stipulated election agreement, which was approved by the Board's Subregional Officer-In-Charge on December 18, 2014.[2] GC Exh. 1(l).

The Stipulated Election Agreement sets forth the following appropriate unit under the Act:

> All full-time and regular part-time maintenance employees employed by the Employer in its Bio Products plant located in Decatur, Illinois; excluding all managers, professional employees, laboratory employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

On January 20 and 21, 2015, a representation election was conducted in the above-specified unit of Respondent's maintenance employees at its Bio Products plant in Decatur, Illinois. The tally of ballots showed the following results:

Approximate number of eligible voters	62
Number of void ballots	0
Number of votes case for the Petitioner	28
Number of votes cast against participating labor organization	33
Number of valid votes counted	61
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	61

There were no challenged ballots. A majority of the valid votes counted were not cast for the Union.

On January 28, 2015, the Union filed objections to seeking to set the election aside. Following an investigation, the Regional Director concluded that there was merit to the Union's Objections 2, 3, and 4, and found additional objectionable conduct. With the approval of the Regional Director, the Union withdrew Objections 1 and 5. On May 22, 2015, the Regional

[1] Although the General Counsel's Brief and the Union's objections indicate that the petition was filed on December 12, 2014, the Regional Director's Report on Objections indicates that the petition was filed on December 15. GC Exh. 1(l); GC Br. p. 5. Employee Nick Mitchell also testified that the Union filed the petition around December 15. Tr. 42. The petition itself was not made part of the record. As such, I find that the later date is correct.

[2] All dates are in 2014 unless otherwise indicated.

Director issued a report on objections and consolidated the objections with the instant unfair labor practice cases for hearing. GC Exh. 1(l).

The Union filed the charge in Case 25–CA–143250 on December 22 and an amended charge on March 31, 2015. The Union filed the charge in Case 25–CA–145578 on March 3, 2015 and an amended charge on March 31, 2015. The General Counsel issued a consolidated complaint on April 30, 2015. GC Exh. 1(i). Respondent timely filed an answer to the consolidated complaint, denying the allegations and setting forth two affirmative defenses. GC Exh. 1(k). The essence of the complaint, and the Union's objections, are as follows (the paragraph numbers below mirror those in the consolidated complaint):

5a) Respondent, by Tony Facchinello, interrogated employees about their union activities, created an impression of surveillance among Respondent's employees, and threatened employees with unspecified reprisals on or about September 12, 2014, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

5b) Respondent, by Tony Facchinello, interrogated employees about their union activities and created an impression of surveillance among Respondent's employees, and threatened employees with unspecified reprisals on or about December 1, 2014, in violation of Section 8(a)(1) of the Act.

5c) Respondent, by Butch Rentmeister, changed the location of maintenance employees' breaks, on December 17, 2014, thus creating and impression of surveillance and engaging in actual surveillance of employees' union activities, in violation of Section 8(a)(1) of the Act. This violation is alleged as objectionable conduct in the Union's Objection 4.

5d) Respondent, by Tony Facchinello, interrogated employees about their union activities and the union activities of others in January 2015, in violation of Section 8(a)(1) of the Act. This violation is alleged as Additional Objectionable Conduct by the Regional Director.

5e) Respondent, by Butch Rentmeister, interrogated employees about their union activities and the union activities of others and threatened employees with unspecified reprisals if they engaged in union activity in January 2015, in violation of Section 8(a)(1) of the Act. This violation is alleged as Additional Objectionable Conduct by the Regional Director.

5f) Respondent, by David Pickett, intimidated and harassed employees by singling them out for their union activities in front of others on or about January 6, 2015, in violation of Section 8(a)(1) of the Act. This violation is alleged as objectionable conduct in the Union's Objection 2.

6a) Respondent changed the location and length of maintenance employees' breaks on or about December 17, 2014, because employees supported the Union and to discourage employees from engaging in these activities, in violation of Section 8(a)(3) and (1) of the Act. This violation is alleged as Additional Objectionable Conduct by the Regional Director.

6b) Respondent denied maintenance employees' personal holidays since about January 4, 2015, because employees supported the Union and to discourage employees from engaging in

these activities, in violation of Section 8(a)(3) and (1) of the Act. This violation is alleged as objectionable conduct in the Union's Objection 3.

Respondent's affirmative defenses assert that some of the allegations of the consolidated complaint are time barred under Section 10(b) of the Act and that some or all of the allegations of the consolidated complaint fall outside the scope of the underlying charges. GC Exh. 1(k).

The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures and sells food and feed products at its facility in Decatur, Illinois, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent processes corn dextrose into food grade and industrial grade products, including xanthan, lysine, sorbitol, and lactic acid, for human and livestock consumption at its Bio Products facility in Decatur, Illinois. Departments at the Bio Products facility include fermentation, refinery, bio 2, polyol, utility, laboratory, engineering, and maintenance. The polyol and utility departments are located in separate buildings from the main building, where most of the departments are located. Respondent's maintenance department has employees stationed throughout the Bio Products facility, including in the polyol department.

Michael Pasquariello is the plant manager of the Bio Products facility and is the highest ranking management official at that facility. Anthony Facchinello has served as the superintendent of the maintenance department since July 2014. Richard "Butch" Rentmeister is the maintenance supervisor in Respondent's fermentation department and he reports directly to Facchinello. In all, 6 maintenance supervisors and 61 employees report to Facchinello.

Tracy Mosser is Respondent's human resources manager at the Bio Products facility. David Pickett is a senior employee and labor relations representative for Respondent. He works at

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Respondent's corporate office, which is also located in Decatur, but is separate from the Bio Products facility. Respondent admits, and I find, that Rentmeister, Facchinello, and Pickett are supervisors of Respondent within the meaning of Section 2(11) of the Act or agents of Respondent within the meaning of Section 2(13) of the Act. GC Exh. 1(k).

B. Respondent's Maintenance Department

As noted above, Facchinello is the superintendent of Respondent's maintenance department. This department encompasses electrical and instrumentation (E/I) technicians and apprentices, probe technicians, filter technicians, utility building technicians, storeroom attendants, mechanics, and two tank crews. R. Exh. 1. These employees are assigned to work throughout the Bio Products facility.

Eight employees in the maintenance department are members of a maintenance tank crew. Respondent has two tank crews with four employees per crew. Employees assigned to the tank crew work rotating 12-hour shifts. Most of the work of the tank crews is performed in the fermentation department, but they may also work on tanks located in the refinery and bio 2 departments.

Nick Mitchell is the leadman of one of Respondent's tank crews. Mitchell was appointed tank crew leader on September 11, 2014, by Facchinello. ER Exh. 13; Tr. 254. Other employees on Mitchell's tank crew are Greg Dennison, Sean Kelly, and Kyle Logue.

C. The Union Campaign

On December 15, 2014, the Union filed a petition for a representation election with the Board. In its petition, the Union sought to represent a unit of maintenance employees at Respondent's Bio Products facility. No evidence was adduced at the trial regarding when the Union began its organizing efforts among Respondent's employees or the extent of those efforts. However, there was no open union activity during the campaign such as the distribution of union literature, the wearing of union insignia, or the like.

There had been two prior efforts to organize Respondent's maintenance employees. First, in 2010, a representation election was held regarding a petition filed by the Teamsters. Tr. 41. An election was held in 2013 regarding a previous petition filed by the Union. Tr. 40-41. Respondent's maintenance employees did not select union representation in the 2010 or 2013 election.

Mitchell vehemently denied that he was a "lead" or "open" Union organizer during any of the Union campaigns. However, I find that Mitchell's union support would have been known to or suspected by Respondent. Mitchell served as an observer for the Teamsters in the 2010 election. Tr. 79. Additionally, he testified at a Board-conducted community-of-interest hearing in 2010. Tr. 83. Moreover, Mitchell's testimony on this point was not convincing. When asked whether he was the lead organizer in the second [2013] campaign, Mitchell answered a question with a question by responding, "What's your definition of lead organizer?" Tr. 82. Mitchell also testified in his pre-trial affidavit that "I was the lead organizer in the first campaign." Tr. 80-81. When asked if he was the lead organizer in the most recent campaign, Mitchell asked, "May I

have a second?" Tr. 83. Only after being directed to answer the question, Mitchell quickly stated that he was not the lead organizer. Tr. 83-84. However, this testimony was contradicted by other witnesses called by the General Counsel, including Sean Kelly. Tr. 150. I find that these contradictions and hesitations in answering questions diminish Mitchell's credibility on this point and I find that Mitchell's union sympathies would have been known to or at least suspected by Respondent's supervisors and managers.[4]

Even though I find that Respondent would have known or suspected that Mitchell was sympathetic to the Union, I do not find that Respondent would have known that Mitchell was an organizer. No evidence was adduced at trial that Mitchell engaged in union organizing activities on Respondent's premises. Furthermore, no evidence was adduced that any of Respondent's supervisors or managers ever observed Mitchell engage in organizing activity. Thus, although I find that Mitchell would have been regarded as being pro-union by Respondent, I do not find that he engaged in union organizing activity or that such activity was known to Respondent.

D. Alleged September 2014 Incident

Mitchell testified that he was summoned to Facchinello's office on September 12, 2014, during the night shift. Tr. 42. Mitchell had been promoted to leadman on the tank crew by Facchinello 1 day earlier. When Mitchell arrived at the office, they discussed Mitchell's application for a temporary foreman position. Facchinello stated that it would be difficult for Mitchell to receive training for this position because of his shift work. Mitchell agreed that it would be difficult. Facchinello asked Mitchell if he would be willing to come in on his days off for training. Mitchell said no.

According to Mitchell, Facchinello then stated, "Nick, I do not like liars." Mitchell replied, "ok." Facchinello then stated, "Nick, I know that you ran the last two [union] campaigns." Mitchell was dumbfounded. Facchinello then went on to ask if Mitchell was running a union campaign to which Mitchell replied no. Facchinello stated that if he found out that Mitchell, as a leadperson, had any involvement [in a union campaign], he would be very disappointed in him. Mitchell did not respond and the meeting ended.

For his part, Facchinello denied telling Mitchell that he knew Mitchell ran the last two union campaigns or that he would be disappointed in Mitchell if he found out Mitchell was running a union campaign. Facchinello also denied asking Mitchell if he was running a union campaign.

Facchinello did testify, however, that he had a conversation similar in content to the one above before Mitchell's promotion to leadman. Tr. 249. Facchinello testified that it was Mitchell who brought up the subject of the Union when he asked if Facchinello had heard rumors about him [Mitchell] leading a union campaign in the plant. Tr. 251. Facchinello testified that he told

[4] While I find that Mitchell's union sympathies were known or at least suspected by Respondent, I do not find that Mitchell self-disclosed his status as a union organizer or adherent. I further do not find that Mitchell self-disclosed rumors that he was a union organizer. Respondent elicited testimony from Facchinello and Pasquariello that Mitchell willingly offered that he was a union organizer or that there were rumors to this effect. Tr. 226-227; 251-253. This testimony defies credulity and I credit the testimony of Mitchell that he did not self-disclose his union organizing activity to Respondent in conversations as alleged by Facchinello and Pasquariello.

Mitchell that he had heard such rumors, as well as rumors about Mitchell chewing tobacco in the plant and procrastinating. Tr. 251-252. Facchinello then gave the following testimony in response to a question by Respondent's counsel:

> Q: Did the subject of employees rights to file petitions and organize come up?
>
> A: Yeah. When he talked—he went back, and he was making comment that—you know, about this—about the Union, him organizing the Union campaign, and he said he thought that that was the reason why people were making comments about him chewing tobacco, because it's a cardinal rule and it was a way to maybe retaliate based on their opinion that or maybe their perception that Nick was, you know—and I told Nick, I said, that, you know, is his prerogative . . .

Tr. 252-253. Although this testimony was not coherent, Respondent's counsel made no effort to seek clarification from Facchinello. I do not credit Facchinello's testimony regarding this conversation with Mitchell as it was both implausible and unclear. Instead, I credit Mitchel's version of the conversation.

E. December 2014 Incident Preceding Filing of Petition

A few weeks before December 1, Mitchell reported that a lock out/tag out had been performed incorrectly by an ADM contractor. Facchinello investigated Mitchell's claim. On December 1, Mitchell was called to Facchinello's office to discuss the results of the investigation. Tr. 46–47.

According to Mitchell, Facchinello told him that the lock out/tag out had not been done incorrectly and that three contractor employees all had the same story. Mitchell replied he had no motivation to lie. Facchinello stated that, surely, three people weren't going to lie to him. Mitchell then said, "Well, Tony, that means you're calling me a liar." Facchinello stated, "Nick I don't like liars and I will find out if you are lying to me." Out of the blue Facchinello then said, "Nick, I know that you ran the last two campaigns." Mitchell interrupted him and asked, "Have I ever told you personally, Tony, that I was involved in any campaign running of anything?" Facchinello said no. Mitchell then said, "Well, then I [would] appreciate that you quit listening to hearsay."

Facchinello acknowledged that this conversation took place. Tr. 260. Facchinello stated that when he met with Mitchell to discuss his investigative findings regarding the lock out/tag out, he told Mitchell that there was nothing that could lead him to believe that the contractor was in violation. Facchinello added that he was concerned with the way the contractor filled out the lock out/tag out. Mitchell then stated, "So are you stating I'm lying to you?" Facchinello replied, "I'm not stating that anybody is lying, I'm just stating that I have these statements." Facchinello said that maybe it was a problem of perception. Mitchell then repeated, "So I'm lying to you?" Facchinello stated, "I'm not saying anyone is lying here, Nick." He said it was the same thing as with other rumors at the plant and he would not take any action based upon a

statement. Facchinello denied making any statements about Mitchell's union activity or Mitchell running two prior union campaigns.[5]

F. December 17, 2014 Allegations

In the early 2000s, Respondent constructed a large maintenance break room in the Bio Products facility. Tr. 54. This break room had many amenities, including refrigerators, microwaves, vending machines, and an ice machine. Tr. 55. After the maintenance break room was constructed, maintenance employees began taking their breaks there, regardless of where they were assigned to work in the Bio Products facility. Tr. 169. This break room is able to seat 60 or so employees and is so large that Respondent sometimes uses it for training or all-plant meetings. Tr. 54; 322.

Respondent's employees working an 8-hour shift receive one 10-minute break in the morning, a 20-minute meal break, and a 10- minute break in the afternoon.[6] R. Exh. 3. Members of the tank crew, who work 12-hour shifts, receive two extra breaks: one additional 10-minute break in the morning and an additional 10-minute break in the afternoon. In essence, all employees, regardless of schedule, receive a paid break every 2 hours. Tr. 178. Employee Sean Kelly testified that the break times did not include travel times to and from the break room.[7] Tr. 137. Additionally, Respondent's maintenance employees were sometimes allowed additional breaks due to high temperatures and safety concerns. Tr. 167. Temperatures in the plant may reach 110 degrees and maintenance employees work with their bodies fully covered for safety reasons. Thus, maintenance employees must remove their protective gear during their breaks and put it back on before returning to work. At the time that Facchinello became maintenance superintendent, all maintenance employees took their breaks in the maintenance break room.

Respondent's employees admitted that they were aware of Respondent's break policies and that they were reminded about the policies. Employee Martin Hadley testified that Respondent brought up breaks over the years. Tr. 166. Employee Greg Dennison testified that employees received annual reminders about breaks. Tr. 180. Tracy Mosser testified that she specifically addressed employee breaks at a meeting with employees in April 2014. R. Exh. 11; Tr. 325–328. However, there is no evidence that Respondent ever enforced its break policy and Facchinello admitted that no employee was ever disciplined for a violation of Respondent's break policies. Tr. 315. In fact, Respondent's employees testified without contradiction that the break length policies were never enforced prior to the filing of the Union's petition. Tr. 138, 197.

According to Facchinello, he decided to change the break locations for most maintenance employees in mid-December because: maintenance employees working in polyol complained

[5] I do not credit Facchinello's version of this conversation and instead credit Mitchell's. Facchinello's testimony on this point was rife with hesitation, as evidenced from his frequent use of the phrase "you know." Instead, I find it more likely that the conversation occurred in the manner testified to by Mitchell.

[6] This rule is sometimes referred to as the 10–20–10 rule.

[7] Kelly's testimony is bolstered by evidence that maintenance employees working in the polyol department drove from the polyol building to the main building to take their breaks in the maintenance break room prior to September 2014. Tr. 313. The round trip drive would have certainly created break times beyond the allotted 10 minutes.

about having to travel to the maintenance break room to take breaks; he had observed breaks being extended by 20 to 30 minutes; and concerns over inefficiency and productivity. Tr. 264–265. Facchinello had earlier implemented such a change for maintenance employees working in polyol in September 2014, well before the Union filed its petition.[8]

After observing maintenance employees taking what he felt were lengthy breaks, Facchinello testified that he met with employees and reminded them to adhere to Respondent's break time policies. He hoped that employees would police the problem themselves, but over time he observed this was not happening. None of Respondent's employees testified that Facchinello met with them to remind them to adhere to Respondent's break time policies prior to his changing of the location of employee breaks. Rentmeister testified that he recommended changing the location of breaks for maintenance employees assigned to departments other than polyol to Facchinello.[9] Tr. 361.

On December 10, Facchinello sent an email to all maintenance employees discussing his first six months as maintenance superintendent. GC Exh. 2. Facchinello specifically mentioned his concerns with employees overstaying their breaks in this email. However, Facchinello did not mention that he was considering changing the location of employee breaks in his email.

Facchinello testified that he decided over the weekend of December 13–14 to implement the change in employee break locations. He did not testify to any specific incident or reason that caused him to make the change at that time. He discussed his idea first with supervisors in human resources because of "complications."[10]

Facchinello and Rentmeister both held meetings with employees to discuss the decision to change the locations of their breaks. The dates of these meetings were never established. Both Facchinello and Rentmeister told employees that the reason for the change in break location was to reduce employee travel times.[11] Tr. 71, 137-138, 166. Rentmeister did not testify about meeting with employees regarding the change in break locations in December 2014.

Although Rentmeister testified to the distances and lengths of time it would take employees to travel between the various departments and the maintenance break room, he testified that he measured the distances and times and prepared a document containing his findings in preparation

[8] However, unlike other changes made by Facchinello, the change in break location for maintenance employees assigned to polyol was urged by the maintenance employees, not Respondent's managers.

[9] Facchinello did not testify that he discussed the issue of employees overstaying breaks with Rentmeister at any time prior to making his decision. However, Facchinello did testify that Rentmeister told him that maintenance employees used to break in the areas where they were assigned prior to the construction of the maintenance break room. Tr. 267.

[10] Facchinello did not elaborate on what these complications might have been and he did not testify to any specific conversations with Respondent's human resources personnel about the change. Mosser was not asked whether she discussed Facchinello's decision to change employee break locations with him.

[11] I do not credit the testimony of Mitchell that Rentmeister told employees that the reason for the change in break locations was so that Respondent could monitor employee breaks. Sean Kelly, who was present when Rentmeister spoke to employees about the change in break locations, did not corroborate Mitchell's testimony. No one else gave testimony about such a statement. As such, I do not credit Mitchell's testimony on this point.

for the hearing.[12] R. Exh. 14A; Tr. 366. Conversely, all of Respondent's employees testified that it took only 2–3 minutes to travel between fermentation or bio 2 and the maintenance break room. Tr. 58, 59, 166, 180. I credit the testimony of the employees over that of Rentmeister in this regard.

Facchinello sent an email to all maintenance department employees memorializing the change in break locations on December 17. GC Exh. 3. Under Facchinello's new system, maintenance employees working in the refinery department would continue to take their breaks in the maintenance break room. All other maintenance employees would break in the departments where they were working. GC Exh. 3.

Rentmeister admitted that he began to monitor the length of maintenance employees' breaks in December 2014. Tr. 363. He did so by walking by the break room at the beginning of their break and then again at the end of the break time. Tr. 363. If he noticed employees in the break room beyond their scheduled break times, he would tell them to return to work. Tr. 364. Employees noticed Rentmeister walking by the break room and looking in at them during this time frame. Tr. 72–73; 139; 180–181. It is undisputed that the environment in the Bio Products facility is very loud and that anyone walking by any of the employee break rooms would not be able to hear what was going on inside. Tr. 104.

In late January 2015, after the election, Facchinello modified his decision regarding employee break locations after receiving a complaint from Mitchell. GC Exh. 4; Tr. 63–67; 277–278. On January 26, 2015, Mitchell radioed Facchinello and asked him to come to the fermentation department break room. Due to fermentation department and maintenance department employees taking their breaks at the same time, the break room was so crowded that Mitchell could not sit down to take his break. When Facchinello arrived in the break room, he observed Mitchell standing. Tr. 64–65; 277. Mitchell asked Facchinello if he would like to take his breaks standing up, to which Facchinello replied no. Mitchell said that he would not ask fermentation employees to stand so that he could sit for his break. Mitchell then asked Facchinello if it was fair that he had to take his break standing up, to which Facchinello replied no. Mitchell then reminded Facchinello that it was his decision to change the break locations. Facchinello responded that it was his hope that the fermentation employee breaks and maintenance employees' breaks would not conflict. Mitchell then told Facchinello that "you can see that's not happening." Facchinello promised to look into finding a solution and said that he would get back to Mitchell.

Later, Facchinello sent an email message to all maintenance employees regarding break locations. GC Exh. 4. In his email, Facchinello stated that due to space constraints in the fermentation department, he was again changing the break and lunch locations for day shift employees. Under the further revised system, maintenance employees assigned to refinery and fermentation would take their breaks and lunch in the maintenance break room. Other maintenance employees would continue to break in the departments to which they were assigned.

[12] Rentmeister indicated that it would take 7 minutes from fermentation and 8 minutes from bio 2 to travel to the maintenance break room. I do not credit Rentmeister' s testimony on this point and instead credit the testimony of Respondent's employees, as I did not find Rentmeister to be a generally credible witness. I further accorded little weight to Rentmeister's document because it was not relied upon by Facchinello when making his decision to change the location of employee breaks.

In addition, Facchinello reminded employees to hold themselves accountable for abiding by the break time rules.

G. January 2015 Allegation Regarding Facchinello

Employee Kyle Logue testified that while in the locker room at work, Facchinello asked him if Nick Mitchell was forcing him to join the Union. Tr. 194. This locker room is shared by employees and management. When asked to recount the conversation, Logue testified that Facchinello asked, "So is Nick forcing you to go union yet?" Tr. 195. Logue testified that he responded, "Nobody forces me to do anything and I make my own choices." Logue testified that Facchinello then changed the subject.

Facchinello denied ever asking Logue about Mitchell or the Union. Tr. 261. Facchinello testified, however, that he had multiple conversations with Logue in the locker room and that the topic of the Union arose. Tr. 262. According to Facchinello, it was Logue who initiated the conversations by stating that he was frustrated with Mitchell talking to him about the Union and wanting him to sign a union card. In response to a question by Respondent's counsel on this issue, Facchinello gave the following response:

> And I have replied that I'm not involved in the Union process, that is the hourly employees' rights to be able to, you know, petition for the Union, that I'm not the person that can help them with that matter and that I suggested that he talk to somebody in HR about that, because I just—I don't have enough—I don't know enough about it.

Tr. 262. Facchinello was unable to state how many such conversations he had with Logue or the exact words used in any of the conversations. Tr. 261–262; 310–311. Facchinello's testimony was given hesitatingly and in a confusing manner. In addition, he attempted to embellish his testimony on rebuttal by stating for the first time that Logue complained about Mitchell's work performance during these conversations. Tr. 410–412. Therefore, I credit the testimony of Logue over that of Facchinello in this instance.

H. January 2015 allegations regarding Rentmeister

Two witnesses testified that they were interrogated by Rentmeister in January 2015. Employee Greg Dennison testified that in January 2015, prior to the election, he was in the office of Rentmeister, the maintenance supervisor in fermentation. Tr. 177. Dennison testified that Rentmeister asked him what his thoughts were and how the campaign was going. Dennison did not respond. Another manager, identified as John Dodwell, then told Rentmeister that he wasn't allowed to be asking questions like that. Dodwell was not called as a witness. When asked if he posed this question to Dennison and whether the other manager responded as testified to by Dennison, Rentmeister testified, "Not to my knowledge."[13] Tr. 369–370.

[13] As Rentmeister did not deny that the conversation occurred as testified to by Dennison, I credit Dennison's testimony.

Employee Martin Hadley testified that in early January 2015 he was in Rentmeister's office to receive a work assignment. Tr. 163. Out of the blue, Rentmeister asked Hadley, "Well why do you guys want to get a union in here?" Hadley stared at Rentmeister for a minute, not knowing what to say. He eventually responded, "Well probably the same reason why you wanted to get one in here." Hadley stated that employees wanted to be treated more fairly. Hadley did not remember Rentmeister making any further response.

Rentmeister testified that the encounter went somewhat differently. Rentmeister denied asking Hadley why he wanted a union. Instead, Rentmeister testified that he overheard Hadley telling another person that he wanted to bring in a union for the same reason Butch Rentmeister wanted to bring in a union. Rentmeister could not remember to whom Hadley was speaking.[14]

Employee Kyle Logue also testified to an incident involving Rentmeister in December 2014 or January 2015. According to Logue, he was speaking with Rentmeister about an issue with a seal when Rentmeister told him, "Don't go down with a sinking ship." Tr. 200. Logue testified that he did not know what Rentmeister meant by this statement. Tr. 200. Logue testified that Dennison was present for this conversation. Dennison was not asked about Rentmeister making this statement and he did not testify about it. Rentmeister was not asked about whether he made this statement or not.

I. January 2015 Allegations Regarding Pickett

During the most recent union campaign, Pickett conducted meetings for maintenance department employees. Tr. 34. Pickett described these meetings as "informational," while employees characterized the meetings as "anti-union." Tr. 48, 175, 377. During the January 6, 2015 meeting, Mitchell felt that he was singled out by Pickett. Tr. 50. About 15 maintenance department employees were present for this meeting. Tr. 378. According to Mitchell, Pickett stated that when employees had questions about the Union, they could ask Mitchell. Tr. 50. Mitchell asked Pickett if he was insinuating that he was the leader of the union campaign. Pickett said no, but that he thought Mitchell would have the answer. Tr. 50.

According to employee Sean Kelly, Pickett did not say anything to Mitchell during this meeting. Instead, Kelly testified that when Pickett was talking to the group, he focused his attention and eyesight on Mitchell. Tr. 135. According to employee Greg Dennison, Pickett referred questions to Mitchell three times during the meetings and stared at Mitchell. Tr. 176.

Steve Hartwig, a maintenance department employee called as a witness by Respondent, testified that at the meeting in question he asked Pickett when the union authorization cards were

[14] I credit the testimony of Hadley over that of Rentmeister. I did not find Rentmeister' s brief testimony credible. For example, he testified that he was present in Facchinello's office for the conversation between Facchinello and Mitchell about the lock out/tag out investigation. Tr. 374. Neither Facchinello nor Mitchell testified that he was present. Also, like Facchinello, he embellished his testimony on rebuttal to indicate for the first time that Logue had complained about Mitchell's work performance. Finally, as a current employee of respondent, Dennison's testimony is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully).

signed. Pickett told Hartwig he would have to ask the Union. Hartwig then turned to Mitchell and asked Mitchell, but did not remember Mitchell's response. Hartwig also asked Mitchell what the Union could do for him. Hartwig testified that, during the meeting, Pickett asked Mitchell questions. Tr. 232. Although Hartwig could not remember the exact questions asked by Pickett, he remembered that "it was in the context of the Union effort." Tr. 232. Pickett denied that he ever asked Mitchell a question at the meeting. Tr. 382. Mosser denied that Pickett asked questions of or directed questions to Mitchell. Tr. 341, 342.

In this instance, I credit the testimony of Mitchell, Hartwig, and Dennison that Pickett referred questions to Mitchell during the meeting. In addition, I credit the testimony of Mitchell, Kelly, and Dennison that Pickett stared at Mitchell during the meeting. Although Pickett testified that attention may have been focused on Mitchell because Mitchell asked an inordinate number of questions at the meeting, this testimony was not corroborated by any of the maintenance employees present at the meeting, including Hartwig. Moreover, Pickett could not recall any of the specific questions allegedly asked by Mitchell. Tr. 385–86. Therefore, I credit the testimony of the employee witnesses present at the meeting.

J. Allegation Regarding Denial of Personal Holidays

Respondent gives its employees three personal holidays per year.[15] Tr. 73, 141, 169, 183, 201, 283. These personal holidays do not "roll over" and must be used in the year they are given or they are lost. Tr. 73. Personal holidays may be taken in one of two ways: an employee may request and schedule a personal holiday in advance by completing an all-purpose form or an employee may call in request a personal holiday. When using the latter method, employees call Respondent's employee call-off line. If Facchinello is not present, a maintenance employee is directed to a superintendent or foreman who takes down the employee's information on an all-purpose form. For employees in the maintenance department, these forms are directed to Facchinello. There is no dispute that when maintenance employees call-in to request a personal holiday, their requests can only be approved by Facchinello.[16] Tr. 141, 284–285.

Respondent maintains a no-fault attendance policy. R. Exh. 2. Employees are given 10 points to use on a rolling, 365-day basis. R. Exh. 2; Tr. 289. Employees may use these points for a variety of reasons, including visits to the doctor or vacations. Tr. 289. If a personal holiday request is denied and the employee does not report to work, the employee is assessed one point under the attendance policy. Tr. 288. If the employee is told that his request for a personal holiday has been disapproved and the employee reports to work late, he or she is assessed one-half point. Tr. 295.

Respondent maintains a work rule concerning how many employees can be off at one time from a single department. R. Exh. 1. According to Respondent's rule, which is posted and known to employees, only one person on each tank crew is authorized to be absent on a

[15] Although Jt. Exh. 1 indicates that employees receive one personal holiday and two floating holidays per year, it is clear from the testimony at trial that employees receive three personal holidays per year. In this instance, I credit the testimony of the witnesses over the contents of Jt. Exh. 1.

[16] In at least one instance, Facchinello has abdicated his decision-making authority to longer-tenured managers. Jt. Exh. 2; Tr. 305–306. Facchinello did not explain why he did so. Id.

particular day. R. Exh. 1; Tr. 147, 286. The only exception to this policy is when an employee seeks time off under the Family Medical Leave Act (FMLA). Requests for FMLA leave are granted automatically. Tr. 292. An employee requesting FMLA leave, which is not paid, may seek pay for the day by requesting a personal holiday for the same time period.[17] Personal holiday requests coinciding with FMLA leave are also granted automatically, even if they result in a violation of Respondent's policy concerning how many employees may be absent at one time from a single department.

Respondent's work rules require that personal holiday requests must be approved prior to the start of a shift. R. Exh. 2, par. 5.3.4.2. Nevertheless, these requests may not be approved or denied on the same day as they are made. Respondent's rules also state that a personal holiday request may be denied based on plant needs. R. Exh. 2, par. 5.3.4.2.2. Despite these rules, Respondent's records indicate that personal holiday requests are rarely denied. Between December 2013 and March 2015, Respondent approved over 1,000 personal holiday requests for employees at the Bio Products facility. R. Exh. 10. Among these approved requests were over 250 for maintenance department personnel. In fact, Respondent denied only one request for a personal holiday for a member of the maintenance department (R. Agee) between December 2013 and the filing of the Union's petition.[18] J. Exh. 2; R. Exh. 10. No reason was given for the denial of this employee's request.

On January 4, 2015, three of the four members of Mitchell's tank crew called in to request a personal holiday within hours of the start of their shift. January 4 was the Sunday of the New Years' holiday weekend. Mitchell called in first and his request for a personal holiday was granted.[19] R. Exh. 7.

Dennison called in at 5:40 a.m. on January 4 to request FMLA leave. So that he could be paid, Dennison also requested a personal holiday for this time. R. Exh. 7. Dennison's request was granted as he sought FMLA leave and he was paid for this day through the granting of the personal holiday.

Sean Kelly called in seeking a personal holiday at 5:55 a.m. As noted above, two members of the tank crew (Mitchell and Dennison) were already scheduled to be off on January 4. Consequently, Kelly's request for a personal holiday was denied by Facchinello, but not until

[17] Receiving pay for a personal holiday coinciding with FMLA leave is referred to as pay "in lieu of." Tr. 292.

[18] It appears that Respondent allowed violations of its attendance policy in approving personal holiday requests. For example, both S. Hartwig and K. Bever were granted personal holiday requests on December 9, 2013, even though R. Exh. 1 indicates they are both day shift storeroom attendants and only one may absent per day. R. Exh. 10. In addition, both J. Grimsley and J. Cochran were granted personal holidays on January 6, 2014, even though both were members of the same tank crew and the attendance policy indicates only one member of the tank crew may be off at a time. R. Exhs. 1; 10. None of these approved requests are marked "paid in lieu," which would indicate that they were granted in conjunction with FMLA leave. R. Exh. 7; Tr. 292

[19] The time that Mitchell called in is disputed. Mitchell claims he called at about 2 a.m., but his all-purpose form indicates he called in at 4:48 a.m. R. Exh. 7. This discrepancy is not important, however, because it is undisputed that Mitchell was the first member of his tank crew to call in seeking a personal holiday.

January 5. R. Exh. 7. Kelly did not report to work on January 4 and was consequently assessed a point under Respondent's attendance policy.[20] Tr. 293.

The evidence indicates that Respondent began more strictly enforcing its attendance policy regarding personal holidays in January 2015, after the Union filed its petition. In January and February 2015 alone, Respondent denied 6 personal holiday requests for maintenance employees. Jt. Exh. 2.

DISCUSSION AND ANALYSIS OF THE UNFAIR LABOR PRACTICES

A. Credibility Analysis

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622.

My credibility findings are generally incorporated into the findings of fact set forth above. My observations, however, were that many of Respondent's witnesses appeared less than fully credible. Many of the witnesses lacked complete recall of the events at issue, hesitated in their testimony, or gave improbable testimony. I generally credited the witness accounts which seemed most plausible and were corroborated by other testimony or documentary evidence.

Mitchell testified in a sure manner. However, he appeared exasperated at times on cross-examination and sometimes answered a question with a question. Nevertheless, his testimony was generally plausible and corroborated by other witnesses. As such, I generally credited Mitchell's testimony. Specific instances where I credited other witnesses over Mitchell or declined to credit his testimony are noted in the findings of fact, above.

Sean Kelly appeared calm and open when giving his testimony. He freely testified to opinions seemingly at odds with the General Counsel's theories, including that he agreed with Respondent's position in denying his personal holiday request on January 4, 2015. He did, however, contradict himself on occasion. For example, he testified on cross-examination that Mitchell did not attempt to hide his support for the Union and that his support was well-known by other employees and managers. Then, on redirect examination, Kelly testified that Mitchell did not broadcast his support for the Union to management. Nevertheless, Kelly's testimony was often supported by other witnesses and was logical. As such, I credited his testimony as indicated above in the findings of fact.

[20] Kelly conceded that he agreed with Respondent's business outlook in assessing him the attendance point because Mitchell and Dennison were already off. Tr. 155–156.

I found Martin Hadley to be a particularly credible witness. He testified in a steady and forthright manner. Respondent did not cross-examine Hadley and his direct testimony was not contradicted by that of other witnesses. As such, I have credited Hadley's testimony.

Greg Dennison was also a credible witness. He appeared relaxed and straightforward while testifying. He readily admitted information seemingly favorable to Respondent's case, such as that Respondent reminded employees about break time rules. Tr. 180. Furthermore, Dennison's testimony regarding key events was plausible and supported by other witnesses. Therefore, I have credited his testimony.

Kyle Logue appeared nervous while testifying, but he answered questions in a direct and specific manner. Although he was occasionally unsure of dates when incidents occurred, I do not find that this detracted from his overall credibility. When his testimony was not supported by other witnesses who would be expected to testify favorably for the General Counsel, I did not credit his testimony. Nevertheless, I have generally credited Logue's testimony, except where specifically noted.

Steven Hartwig was soft-spoken and seemed forthright in his testimony. His testimony was largely corroborated by other witnesses. In addition, although he was called as a witness by Respondent, he freely gave testimony that was contrary to that of Respondent's managers. Therefore, I have largely credited Hartwig's testimony as set forth in the findings of fact.

Furthermore, I note that current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital,* 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries,* 316 NLRB 745 (1995), affd. mem. *NLRB v. Flexsteel Industries,* 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products,* 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Therefore, I have accorded the testimony of Respondent's current non-managerial employees enhanced credibility.

I have not credited the brief testimony of Michael Pasquariello in this case. Pasquariello's only testimony bearing on this case concerned the alleged revelation by Mitchell that he was a strong union supporter. Mitchell specifically denied making such a statement to Pasquariello. It defies logic that Mitchell would approach the newly-appointed highest ranking official at the Bio Products facility and announce that he was a "big" supporter of the Union. Instead, I have found that Mitchell's support for unions, which he did not hide, was gleaned by Respondent through Mitchell's service as an observer for a union at a Board-conducted election and his testimony at a Board hearing. Thus, I do not credit Pasquariello's testimony.

I did not generally credit the testimony of Tony Facchinello. He sometimes jumped to answer questions before the questioner was finished. At other times he testified hesitatingly and employed the phrase "you know" when giving testimony regarding critical events. He appeared to stammer at times. His recall of critical events was often vague. I have cited examples of such testimony above in the findings of fact. As such, I credited Facchinello's testimony only where corroborated by other witnesses I have found credible or where it is very plausible, uncontroverted, or contrary to the position of Respondent.

I also did not credit much of the testimony of Butch Rentmeister. His testimony was not corroborated by other witnesses, including Respondent's witnesses. For example, even though he testified that he was present at a meeting with Facchinello and Mitchell regarding a lock out/tag out issue, neither Mitchell nor Facchinello testified that he was present. Additionally, his testimony was often not plausible or specific. However, I did credit Rentmeister's testimony when it was corroborated by other, credible witnesses or was contrary to Respondent's interests.

I specifically did not credit the rebuttal testimony of Rentmeister and Facchinello that Logue complained to them on multiple occasions about Mitchell's work performance. This testimony was offered for the first time on rebuttal. Additionally, despite these allegedly numerous complaints, neither Rentmeister nor Facchinello investigated or disciplined Mitchell. As such, I do not credit this testimony and find that it detracted from the overall credibility of Facchinello and Rentmeister.

Moreover, I did not credit the testimony of David Pickett. He sometimes did not answer questions posed by the General Counsel in a direct fashion. For example, when asked by the General Counsel whether he was involved in meetings with employees during previous union organizing drives, Pickett only replied, "It's possible." This testimony is implausible, as Pickett is a senior labor relations representative of Respondent and has been for 10 years. Furthermore, it defies logic that he would remember the two prior organizing drives but not recall a detail such as this. Pickett also attempted to answer questions before the questioner was finished. His testimony was also contradicted by numerous employees, including one called as a witness by Respondent, who I have found more credible.

I found Tracy Mosser to be a credible witness. She testified in a convincing and sound manner. Her testimony was largely noncontroversial and dealt mainly with Respondent's policies. I have credited her testimony regarding reminding employees about Respondent's break policies.

B. Respondent, by Facchinello, Violated the Act by Interrogating and Threatening Mitchell and Creating an Impression that his Union Activities were under Surveillance

The General Counsel alleges, in paragraph 5(a) of the complaint, that Respondent, by Tony Facchinello, violated Section 8(a)(1) of the Act by: (i) interrogating employees; (ii) informing employees it was aware of their past union activity, creating an impression of surveillance that their current union activities were under surveillance; and (iii) threatening employees with unspecified reprisals. These violations of the Act are alleged to have occurred on or about September 12, 2014, 2 months prior to the filing of the Union's petition. These violations are not alleged as objectionable conduct with regard to the January 2015 election.

In paragraph 5(b) of the complaint, the General Counsel alleges that Respondent, by Tony Facchinello, violated Section 8(a)(1) of the Act by: (i) interrogating employees about their union activities; and (ii) by informing employees it was aware of their past union activity, creating an impression among employees that their current union activities were under surveillance. Like the allegations in paragraph 5(b), these violations are alleged to have occurred on December 1, 2014, prior to the filing of the 2014 petition. These violations are not alleged as objectionable conduct with regard to the January 2015 election.

The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House,* 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. In applying the *Bourne* factors, the Board seeks to determine whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center,* 330 NLRB 935, 941 (2000).

Examining the totality of the circumstances here, I find that Facchinello's interrogations of Mitchell in September and December 2014 were unlawful. In September 2014, Mitchell was summoned to Facchinello's office, where they discussed both Mitchell's recent promotion to leadman and his application for a temporary foreman position. During the conversation, Facchinello stated that he didn't like liars and stated that he knew Mitchell ran two prior union campaigns. Facchinello went on to ask Mitchell if he was running a union campaign and to state that, if he found out Mitchell was running such a campaign, he would be disappointed in Mitchell. Thus, Facchinello was seeking information about Mitchell's union activity and implied that he would take action against Mitchell if he was engaging in union activity. Facchinello was Mitchell's supervisor at the time. The conversation occurred at work, on work time, in the office of the highest ranking person in Mitchell's department. Mitchell did not reply Facchinello's question. Given the lack of a truthful response, the location of the questioning, Facchinello's position with Respondent, and the nature of the information sought, I find that a reasonable employee would feel restrained in exercising his right to engage in union activity under the Act. Therefore, I find that that Facchinello's interrogation of Mitchell in September 2014 violated Section 8(a)(1) of the Act as alleged by the General Counsel in paragraph 5(a)(i) of the consolidated complaint.

Facchinello's statement to Mitchell that he would be disappointed in Mitchell if he found out that Mitchell was engaging in union activity violated Section 8(a)(1) of the Act as a threat of unspecified reprisal. The test for evaluating whether an employer's statement or conduct violates Section 8(a)(1) of the Act is whether under all the circumstances the statements or conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). The employer's subjective motivation is irrelevant. *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 fn. 3 (2000). Furthermore, it is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on whether the coercion succeeded or failed. *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)). The Board has found a threat of unspecified reprisal by a supervisor telling an employee he was "disappointed" to see employee's picture on a pro-union flyer. *Print Fulfillment Services LLC*, 361 NLRB No. 144, slip op. at 1 (2014). See also *Sea Breeze Health Care Center*, 331 NLRB 1131, 1132

(2000) (holding that manager's statement that she was "highly disappointed" with employee's union support was a "veiled threat of reprisal"). Similarly, in this case, I find that Facchinello's statement that he would be disappointed in Mitchell constitutes a threat of unspecified reprisal. Therefore, I find that Respondent violated Section 8(a)(1) of the Act as alleged by the General Counsel in paragraph 5(a)(iii) of the consolidated complaint.

I further find that Facchinello's interrogation of Mitchell in December 2015 violated the Act. In discussing a purported safety violation by a contractor in Facchinello's office, Facchinello told Mitchell that he doesn't like liars and would find out if Mitchell was lying to him. Additionally, Facchinello again told Mitchell he knew that Mitchell had run the last two union campaigns. Mitchell denied involvement in union activity. Facchinello's statements constitute an unlawful interrogation because they were made by Mitchell's supervisor (Facchinello) in the supervisor's office, on work time, and were intended to obtain information regarding Mitchell's union activity which would have been used for action against Mitchell.[21] This last point is proven by Facchinello's repeating of his statement that he did not like liars, which he had used in his September 2014 interrogation, coupled with words that he would somehow find out if Mitchell was lying. Given the lack of a truthful response, the location of the questioning, Facchinello's position with Respondent, and the nature of the information sought, I find that a reasonable employee would feel restrained in exercising his right to engage in union activity under the Act. Therefore, I find that that Facchinello's interrogation of Mitchell in December 2014 violated Section 8(a)(1) of the Act as alleged by the General Counsel in paragraph 5(b)(i) of the consolidated complaint.

I further find that Facchinello's statements to and questions of Mitchell in September and December 2014 created an unlawful impression that his union activities were under surveillance. The Board's test for determining whether an employer has created an impression of surveillance is an objective one. An employer creates an unlawful impression of surveillance when reasonable employees would assume that their activities have been monitored. *Stevens Creek Chrysler,* 353 NLRB 1294, 1295–1296 (2009). Where an employer tells employees that it knows about their union activities, but fails to cite its information source, Section 8(a)(1) is violated because employees are left to speculate about how such information was obtained and might assume that surveillance occurred. Id. at 1296. Facchinello, who was hired by Respondent after the two prior organizing drives, did not reveal the source of his information that Mitchell was a union organizer. Facchinello's statements to Mitchell that he knew Mitchell ran prior union organizing drives without revealing the source of his information would create a reasonable assumption that Respondent had Mitchell's union activities under surveillance. As such, I find that Facchinello's statements to Mitchell in September and December 2014 violated Section 8(a)(1) of the Act as alleged by the General Counsel in paragraphs 5(a)(ii) and 5(b)(ii) of the consolidated complaint.

[21] Although Facchinello's statements in December were not in the form of a question, I still find this to be an unlawful interrogation. Facchinello's accusation that Mitchell had engaged in union organizing was designed to elicit a denial or affirmation from Mitchell, similar to asking an open-ended question. In *Westwood Health Care Center*, 330 NLRB 935 fn. 21 (2000), the Board found an unlawful interrogation quoting the Fifth Circuit's observation that: "unlawful interrogations may occur even when remarks are not 'couched as questions' if an employer agent makes statements that are 'calculated to elicit responses from employees about their union sentiments.'" *NLRB v. McCullough Environmental Services,* 5 F.3d 923, 929 (5th Cir. 1993).

C. Respondent, by Facchinello, Violated the Act by Interrogating Logue

In paragraph 5(d) of the consolidated complaint, the General Counsel alleges that Respondent, by Facchinello, interrogated employees about their union activities and the union activities of others in January 2015, in violation of Section 8(a)(1) of the Act. This allegation forms the basis for "Additional Objectionable Conduct" as found by the Regional Director in his Report on Objections.[22]

In January 2015, Facchinello and Logue were in a locker room on Respondent's premises when Facchinello asked Logue if Mitchell had forced him to go union yet. Logue replied that no one forces him to do anything and he makes his own choices. Logue did not reveal his feelings about the Union to Facchinello. This conversation took place in a locker room maintained by Respondent just before or after a work shift. Facchinello is Logue's supervisor and the highest ranking maintenance department official at the Bio Product's facility. The question posed by Facchinello was clearly meant to elicit a statement from Logue regarding his union sympathies and Logue did not give a truthful reply. Thus, in weighing all of the *Bourne* factors, I find that Facchinello's questioning of Logue constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act, as alleged by the General Counsel in paragraph 5(d) of the consolidated complaint.

D. Respondent, by Rentmeister, Violated the Act by Interrogating Dennison and Hadley

In paragraph 5(e) of the consolidated complaint, the General Counsel alleges that Respondent, by Butch Rentmeister, (i) interrogated employees about their union activities and the union activities of others and (ii) threatened employees with unspecified reprisals if they engaged in union activity in January 2015, in violation of Section 8(a)(1) of the Act. This allegation forms the basis for "Additional Objectionable Conduct" as found by the Regional Director in his Report on Objections.

According to Dennison's credited testimony, in January 2015 prior to the election, he was in the office of Rentmeister, the maintenance supervisor in the fermentation department. Rentmeister asked Dennison what his thoughts were and how the campaign was going. Dennison did not respond. Another manager, who was not called as a witness, told Rentmeister that he wasn't allowed to be asking questions like that. This question was asked by Dennison's supervisor, in the supervisor's office, and sought information regarding the union sympathies of Dennison or his coworkers. Given Dennison's lack of a response, the location of the questioning, Rentmeister' s position with Respondent, and the nature of the information sought, I find that a reasonable employee would feel restrained in exercising his right to engage in union activity under the Act. Thus, in weighing the *Bourne* factors, I find that Rentmiester's questioning of Dennison constituted a violation of Section 8(a)(1) of the Act as alleged in paragraph 5(e)(i) of the consolidated complaint.

[22] Although the consolidated complaint alleges that this interrogation occurred in January 2015, testimony at trial and the General Counsel's brief indicate that it occurred in November or December 2014. Tr. 195; GC Br. p. 5. Logue was unclear of the date of the conversation, but eventually testified that it was around the time of the election in 2015. Tr. 202–203.

According to Hadley's credited testimony, he was in Rentmeister' s office to receive a work assignment in early January 2015. Out of the blue, Rentmeister asked Hadley, "Well why do you guys want to get a union in here?" Hadley stared at Rentmeister for a minute, not knowing what to say. He eventually responded, "Well probably the same reason why you wanted to get one in here." Hadley stated that employees wanted to be treated more fairly. This conversation took place in the office of Hadley's supervisor, on work time, and Rentmeister was seeking information regarding the union sympathies of Hadley and his coworkers. Given the location of the questioning, Rentmeister' s position with Respondent, and the nature of the information sought, I find that a reasonable employee would feel restrained in exercising his right to engage in union activity under the Act. Thus, in weighing the *Bourne* factors, I find that Rentmiester's questioning of Hadley constituted a violation of Section 8(a)(1) of the Act as alleged in paragraph 5(e)(i) of the consolidated complaint.

As indicated in the findings of fact, Logue also testified to an incident involving Rentmeister in December 2014 or January 2015. According to Logue, he was speaking with Rentmeister about an issue with a seal when Rentmeister told him, "Don't go down with a sinking ship." Although Logue testified that Dennison was present for this conversation, Dennison was not asked about Rentmeister making this statement and he did not testify about it. Rentmeister was not asked about making this statement. Even Logue admitted that it was not clear what was meant by Rentmeister' s alleged statement. This statement was vague at best and I cannot find that Rentmeister was referring to any employee's union activity when he made it. Given the lack of corroboration and the uncertainty regarding the meaning of Rentmeister's statement, I find that the General Counsel has not proven that Respondent violated the Act by threatening Logue, as alleged in paragraph 5(e)(ii) of the consolidated complaint and recommend that it be dismissed.

E. Respondent, by Pickett, Violated the Act by Intimidating and Harassing Mitchell

In paragraph 5(f) of the consolidated complaint, the General Counsel alleges that Respondent, by David Pickett, intimidated and harassed employees by singling them out for their union activities in front of others on or about January 6, 2015, in violation of Section 8(a)(1) of the Act. This allegation forms the basis for Objection 2 to the election.

At a meeting meant to discourage employees for selecting union representation, Pickett singled out Mitchell. He did so both by asking him questions and staring at him during the meeting. Pickett's actions were taken in the presence of 15 employees. Singling out identified union supporters in the midst of their coworkers has been found to constitute intimidating and coercive conduct, violative of Section 8(a)(1) of the Act. *Durango Boot,* 247 NLRB 361, 364 (1980). See also *Permanent Label Corp.,* 248 NLRB 118, 135 (1980), enfd. 657 F.2d 512 (3d Cir. 1981) (Singling out union adherents in a meeting with supervisors has an intimidating and coercive effect upon their Sec. 7 rights, in violation of Section 8(a)(1) of the Act). Therefore, I find that Respondent violated Section 8(a)(1) of the Act by intimidating and harassing Mitchell as alleged in paragraph 5(f) of the consolidated complaint.

F. Respondent Violated the Act by Changing the Location of Maintenance Employee Breaks

In paragraph 5(c) of the consolidated complaint, the General Counsel alleges that Respondent, by Butch Rentmeister, violated Section 8(a)(1) of the Act by changing the length and location of maintenance employees' breaks, thus: (i) creating an impression that employees' union activities were under surveillance, and; (ii) engaging in surveillance of employees' breaks.[23] These allegations form the basis for Objection 4 to the election. In paragraph 6(a) of the consolidated complaint, the General Counsel alleges that on December 17, Respondent violated Section 8(a)(3) and (1) of the Act by changing the length and location of employee breaks. This allegation forms the basis for "Additional Objectionable Conduct" as found by the Regional Director in his Report on Objections. Through testimony at the trial, Respondent admitted that it changed the location of employee breaks and surveilled its employees' breaks. Tr. 275, 363.

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to tenure of employment or any term or condition of employment to discourage membership in any labor organization." The Board has recognized that an employer's imposition of a ban on a longstanding employee practice, in retaliation for its employees' support for a union, violates Section 8(a)(3) and (1) of the Act. *Murphy Oil USA, Inc.,* 286 NLRB 1039, 1043 (1987).

To determine whether an employer's adverse employment action violates Section 8(a)(3) and (1) of the Act, the Board applies the analysis articulated in *Wright Line*[24] to establish whether an employer's action against employees violates Section 8(a)(3) and (1) of the Act. To establish a violation, the General Counsel must show, by a preponderance of the evidence, that an employee's union activity was a motivating factor in the employer's decision. Id. at 1089. If the General Counsel makes the required showing, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employee's union activity. Id. The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3–4 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.,* 311 NLRB 498 (1993). Improper motivation may be inferred from several factors,

[23] Although the consolidated complaint alleges that Rentmeister changed the location of employee breaks, the testimony at trial leaves no doubt that it was Facchinello who made the change. This error is of no moment as Facchinello is an admitted supervisor and agent of Respondent and, thus, his actions are imputed to Respondent. *Dorothy Shamrock Coal Co*., 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987).

[24] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

including the timing between an employee's protected activity and the discharge. *Temp Masters, Inc.,* 344 NLRB 1188, 1193 (2005).

In the circumstances of this case, I find that the General Counsel has established that Respondent violated Section 8(a)(3) and (1) of the Act by changing the location of its employees' breaks. The petition in this case was filed on December 15, 2014. Tony Facchinello announced his decision to change the location of employees' breaks on December 17. Respondent asserts that Facchinello made his decision prior to the filing of the petition. The General Counsel asserts that the timing of the December 17 email from Facchinello to the maintenance department employees establishes Respondent's animus.

Initially, I find that Respondent's change in its employees' break locations constituted an adverse employment action. Employment actions are adverse if they change the terms and conditions of employment in an unfavorable way and thus make a job less desirable. *Northeast Iowa Telephone Co.,* 346 NLRB 465 (2006). The evidence established that a majority of the maintenance employees worked in fermentation and, thus, were required to break in the fermentation break room under Facchinello's changed policy. The maintenance break room was clearly nicer and had more amenities than the fermentation break room. Furthermore, there was enough room for all maintenance employees to sit down in the maintenance break room, while maintenance employees sometimes needed to stand for their breaks in the fermentation break room. Changing the location of employee breaks from one where employees can sit down to a crowded place with fewer amenities where employees have to stand is a change for the worse. Thus, I find that the General Counsel has established that the change in employee break locations constitutes an adverse employment action.

In analyzing the change in employee break locations under *Wright Line,* I find that Respondent had knowledge of its employees' union activities by the filing of the petition on December 15.[25] I further find, as asserted by the General Counsel, that the timing of the decision at issue establishes that Respondent harbored animus toward its employees' union activities. The Board has found that timing is evidence of such probative worth that, even standing alone, it may demonstrate antiunion animus as motivation for an employer's actions. *Sears, Roebuck & Co., 337* NLRB 443 (2002), citing *Masland Industries*, 311 NLRB 184, 187 (1993), and *NLRB v. Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984). Moreover, the Board has long held that the timing of adverse action close to the filing of an election petition may raise an inference of animus and unlawful motive. *Lucky Cab Co.,* 360 NLRB No. 43 slip op. at 4 (2014). In this case, Respondent took its swift action within mere days of the filing of the election petition.

Further supporting the conclusion that Respondent had knowledge of and bore animus to its employee's union activities, Respondent has offered no persuasive explanation as to why Facchinello chose to address the longstanding problems of employees overstaying their breaks 2 days after the filing of the election petition. The Board has found a violation of Section 8(a)(3) and (1) when an employer took sudden action to address an "age old" problem without providing

[25] I did not credit Facchinello's testimony that he was unaware of the filing of the petition at the time he decided to change the location of the employees' breaks. Facchinello could not elucidate a reason for the timing of his decision. In the absence of a cogent reason, I find that it was the filing of the petition triggered Facchinello's action.

evidence as to how the situation worsened requiring immediate action. *Sivalis, Inc.,* 307 NLRB 986 (1992). In *Sivalis,* like in the instant case, the employer changed rules regarding of employee breaks shortly after its employees engaged in union activity. The Board noted that employees would not miss the sudden impact of a change taken to prevent employees from overstaying meal or other breaks. Id.; see *Speed Mail Service,* 251 NLRB 476, 477 (1980). Similarly, in this case, Respondent produced no evidence establishing why Facchinello chose to address the age-old problem of overstaying breaks at this particular time. Thus, as in these cases, I find that Respondent violated Section 8(a)(3) and (1) of the Act by changing the location of employee breaks as alleged by the General Counsel in paragraph 6(a) of the consolidated complaint.

Facchinello's changing of the employees' break location, coupled with the other violations noted above further establish Respondent's unlawful motive. I have found that Respondent committed numerous other violations of Section 8(a)(1) both before and after Facchinello changed the location of maintenance employees' breaks. Findings of 8(a)(1) violations, including interrogations and threats, may be used to establish animus. *Kajima Engineering & Construction, Inc.,* 331 NLRB 1604 (2000). Thus, in addition to the timing of Facchinello's decision, I find that the interrogations of Mitchell, Dennison, and Logue, Facchinello's threat to Mitchell, and Pickett's singling out of Mitchell establish Respondent's antiunion animus.

I do not find, however, that Respondent has met its burden under *Wright Line.* In order to meet its burden, Respondent would need to prove that it would have taken the same action (i.e., changed the location of employee breaks) in the absence of its employees' union activity. Although Respondent asserts that it changed the location of employee breaks in response to employees overstaying their breaks, it could not advance a cogent reason for the timing of its action or an incident that lead to taking this action. As such, I find that Respondent has not met its burden under *Wright Line.* Thus, I find that Respondent violated the Act as alleged in paragraph 6(a) of the consolidated complaint.

However, I do not find that the General Counsel has established that Respondent took an adverse employment action against its employees by changing the length of their breaks. The evidence clearly establishes that Rentmeister began more closely monitoring employee breaks in December 2014. However, none of the employees who testified at the hearing testified that they took shorter breaks as a result of this monitoring. In addition, no employee was ever disciplined in any way as a result of Rentmeister's increased observation of employee breaks. Although Rentmeister's actions might have been annoying to employees, it was not established that his actions made employee breaks more onerous or shorter. Thus, the General Counsel has not established, by a preponderance of the evidence, that Respondent took any adverse action against employees by Rentmeister more closely observing employee breaks. Thus, I find that the General Counsel has not met its burden in establishing a violation of Section 8(a)(3) and (1) regarding changing the length of employee breaks.

Moreover, I do not find that the General Counsel established that Respondent independently violated Section 8(a)(1) of the Act by engaging in surveillance of employee breaks and creating an impression that employees' union activities were under surveillance by more closely monitoring employee breaks. An employer violates Section 8(a)(1) when it surveilles employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and

thereby coercive. *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB,* 993 F.2d 913 (D.C. Cir. 1993). Although the record is clear that Rentmeister began more closely monitoring employee break times during the critical period, there is no evidence that the employees were engaged in any sort of Section 7 activity at any time that they were being surveilled. In fact, Respondent's employees indicated that they did not engage in any Section 7 activity on Respondent's premises during the critical period. Therefore, I cannot find that Respondent engaged in unlawful surveillance of employee Section 7 activity as alleged in the complaint. Accordingly, I recommend dismissal of paragraph 5(c)(i) of the consolidated complaint and Objection 4 to the conduct of the election.

The impression of surveillance allegation fails for similar reasons. I have not found any credible evidence that Respondent, through its supervisors or agents, made any statements regarding the changing of employee break locations and times that would lead a reasonable employee to believe that his or her *union or other protected concerted activities* were under surveillance. Thus, I recommend dismissal of paragraph 5(c)(ii) of the consolidated complaint and Objection 4 to the conduct of the election.[26]

G. Respondent Violated the Act by Denying Maintenance Employees' Personal Holiday Requests

In paragraph 6(b) of the consolidated complaint, the General Counsel alleges that Respondent denied maintenance employees' personal holidays since about January 4, 2015, because employees supported the Union and to discourage employees from engaging in these activities, in violation of Section 8(a)(3) and (1) of the Act. This allegation forms the basis for Objection 3 to the conduct of the election.

As found above, Respondent rarely denied requests for personal holidays prior to the filing of the union's petition. In fact, the attendance records submitted by Respondent demonstrate that only one such request was denied in the year preceding the filing of the petition. It was only after the filing of the petition that Respondent began denying personal holiday requests. Respondent's more strict enforcement of its attendance policy beginning in January 2015 violated Section 8(a)(3) and (1) of the Act. Changes in enforcing an existing attendance policy have been found violative of the Act. *Illiana Transit Warehouse Corp.,* 323 NLRB 111, 118 (1997). See also *Print Fulfillment Systems,* 361 NLRB No. 144, slip op. at 4 (2014) (Respondent's stricter enforcement of work rules in response to an employee's union activity violated Section 8(a)(3) of the Act).

Analyzing this violation under *Wright Line,* as found above, Respondent's employee engaged in union activity by the filing of the election petition, Respondent had knowledge of this activity, and Respondent bore animus toward this activity. The timing of these denials, beginning in January 2015, is dubious at best. Thus, the General Counsel has established a prima facie case. Respondent has not met its rebuttal burden regarding this violation. Respondent offered no reason for more strictly enforcing its personal holiday policy. Also, Respondent's assertion that

[26] If the Board or a court should disagree with my findings regarding the length of employee breaks, surveillance, or creating the impression of surveillance, I note that had I found these violations, the remedy would not be materially changed.

it was merely enforcing its existing policy ignores the evidence that Respondent previously allowed violations of its attendance policy in approving personal holiday requests. Additionally, if Respondent were truly concerned with the ability of a tank crew to perform its work, it might have called Kelly or another employee in to work on January 4. There is no evidence that this was done and instead Respondent allowed three members of a tank crew to be absent on January 4. Therefore, I find that Respondent has not established that it would have taken the same action in denying personal holiday request absent its employees' union activity. As such, I find that the General Counsel has established, by a preponderance of the evidence, that Respondent violated Section 8(a)(3) and (1) of the Act as alleged in paragraph 6(b) of the consolidated complaint.

H. Respondent's Did Not Prove its Affirmative Defenses

In its answer to the consolidated complaint, Respondent has raised two affirmative defenses: that the allegations contained in the consolidated complaint are time barred and that some or all of the allegations of the consolidated complaint fall outside the scope of the underlying charges. I note that Respondent did not provide any argument or citation to case law supporting these affirmative defenses in its brief. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.,* 361 NLRB No. 132, slip op at 14 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Section 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). Furthermore, in examining the charges and consolidated complaint, I see no basis for Respondent's affirmative defenses. Therefore, I find that Respondent has failed to meet its burden regarding its affirmative defenses.

OBJECTIONS TO CONDUCT AFFECTING THE ELECTION

As noted at the outset of this decision, the Union filed timely objections to conduct affecting the results of the election, which parallel the unfair labor practice allegations of the consolidated complaint. While the Union has withdrawn two of the objections that it filed, there are three others, in addition to the additional objectionable conduct found by the Regional Director, that remain for consideration. The Board has long held that it will set aside an election if one party engages in conduct that interferes with employee free choice during the critical period between the filing of the petition for an and the date of the election. *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961). Conduct which violates the Act interferes with an election unless it is *de minimis* and virtually impossible to conclude that the violation could have affected the election results. *Jewish Home for the Elderly of Fairfield County*, supra at 1115; *Airstream, Inc.* 304 NLRB 151, 152 (1991); *Dal-Tex Optical Co*., 137 NLRB 782, 786 (1962). Based on my findings set forth above, the Respondent has committed numerous violations of the Act that occurred during the critical period between the filing of the petition on December 15, 2014, and election conducted on January 20 and 21, 2015, which parallel the objections filed by the Union and found by the Regional Director. Specifically, I have found that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a), 5(b), 5(d), 5(e)(i), and 5(f) of the consolidated complaint, and violated Section 8(a)(3) of the Act as alleged in paragraphs 6(a) and 6(b) of the consolidated complaint. Thus, I find that Respondent committed objectionable conduct as alleged in the

Union's Objections 2 and 3, and "Additional Objectionable Conduct" as alleged by the Regional Director as alleged in his Report on Objections.[27]

The Board has traditionally held that conduct violative of Section 8(a)(1) of the Act is also conduct which interferes with the exercise of a free and untrammeled choice in an election. As such, it serves as a basis for invalidating an election. According to the Board, conduct which is violative of Section 8(a)(1) of the Act is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Playskool Mfg. Co*., 140 NLRB 1417 (1963); see also *IRIS U.S.A., Inc*., 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc*., 326 NLRB 28 (1988). Further, the Board has held that this is also "because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). See also *Overnite Transportation Co*., 158 NLRB 879 (1966); *Excelsior Underwear*, 156 NLRB 1236 (1966). Respondent has committed numerous violations of Section 8(a)(1) of the Act by interrogating and threatening its employees. Accordingly, I have determined that the Respondent's misconduct during the critical period is sufficient to set aside the results of the election held on January 20 and 21, 2015, and I make the following findings with respect to the objections filed by the Union regarding conduct occurring during the critical period.

The meritorious objections filed by the Union involve, inter alia, the interrogation of four employees, creating an impression that employees' union activities were under surveillance, making an unlawful threat of reprisal, intimidating and harassing an employee supporter of the Union by a senior official of Respondent at a meeting attended by approximately 15 maintenance employees, changing the location of employees' breaks, and denying employees' personal holiday requests by more strictly enforcing attendance policies during the critical period. I find that the conduct which I have found has violated the Act during the critical period is clearly more than *de minimis* pursuant to the principles expressed in the cases cited above. In reaching this conclusion, I have considered the fact that the union lost the election by a narrow margin, 33 to 28. The Board gives significant weight to close election results in determining whether misconduct warrants setting an election aside. *Student Transportation of America, Inc*., 362 NLRB No. 156, slip op. at 3 (2013); *Hopkins Nursing Care Center*, 309 NLRB 958, 959 (1992).

Based on the above, I conclude that the objectionable conduct and unfair labor practices engaged in by the Employer have tended to interfere with the free and fair choice of a determinative number of voting unit employees. Accordingly, as the election results do not reflect the employees' free and fair choice, I recommend that the election be set aside and that this proceeding be remanded to the Regional Director for Region 25 for the purpose of conducting a second election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section

[27] As I did not find that Respondent violated the Act as alleged in paragraph 5(c) or 5(e)(ii) of the consolidated complaint, I recommend that the Union's Objection 4 and the "Additional Objectionable Conduct" related to paragraph 5(e)(ii) of the consolidated complaint be dismissed.

2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by: twice interrogating employee Nick Mitchell in September and December 2014 and separately interrogating employees Kyle Logue, Greg Dennison, and Martin Hadley in January 2015.

4. Respondent violated Section 8(a)(1) of the Act by informing employees it was aware of their past union activities and creating an impression that their current union activities were under surveillance.

5. Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals.

6. Respondent violated Section 8(a)(1) of the Act by intimidating and harassing employees by singling them out for their union activities.

7. Respondent violated Section 8(a)(3) and (1) of the Act by changing the location of maintenance employees' breaks.

8. Respondent violated Section 8(a)(3) and (1) of the Act by denying maintenance employees' requests for personal holidays.

9. Respondent did not otherwise violate the Act as alleged.

10. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. Respondent engaged in objectionable conduct during the critical period by committing the unfair labor practices set forth in paragraphs 3 through 8 of these Conclusions of Law, as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully changed the locations of employees' breaks, I recommend that Respondent be ordered to rescind these changes and restore the status quo existing prior to December 15, 2015.

Having unlawfully more strictly enforced its attendance policy, I recommend that Respondent be ordered to rescind such changes and restore the status quo existing prior to January 4, 2015, and, rescind and remove any record of any adverse personnel action it may have taken against maintenance department employees by its changes.

For the reasons discussed above, I have found that Respondent engaged in objectionable conduct the requires setting aside the election conducted January 20 and 21, 2015, in Case 25–RC–142796, and that a new election be held on the terms set forth immediately below.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at Respondent's Bio Products facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physically posting the paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2014. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 25 of what action it will take with respect to this decision.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended direction of second election and order.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employees employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.,* 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period ending immediately before the date of the Notice of Second Election, striking employees who have been discharged for cause since the strike began and those who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL–CIO, CLC Local 103-G.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of

Second Election. *North Macon Health Care Facility,* 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Archer Daniels Midland Company (ADM), Decatur, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and the union activities of other employees.

(b) Informing employees that it is aware of their past union activities and creating an impression that their current union activities were under surveillance.

(c) Threatening employees with unspecified reprisals.

(d) Intimidating and harassing employees by singling out them out for their union activities.

(e) Changing the location of maintenance employees' breaks.

(f) Denying maintenance employees' requests for personal holidays by more strictly enforcing its attendance policies.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) At the maintenance employees' request, grant them the personal holidays which they were denied in retaliation for their union activities.

(b) Restore the location of maintenance employees' breaks as they existed prior to December 15, 2015.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful assessment of attendance points or other discipline to Kyle Logue, and within 3 days thereafter notify him in writing that this has been done and that the attendance points or other discipline will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its Bio Products facility in Decatur, Illinois, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERD that the election in Case 25–RC–142796 is set aside, and that a new election shall be conducted at a date and time to be determined in the discretion of the Regional Director. The second election shall be conducted in a manner consistent with the "Direction of Second Election" set forth above.

Dated, Washington, D.C. January 12, 2016

Melissa M. Olivero
Administrative Law Judge

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities or the union support or activities of other employees.

WE WILL NOT inform you that we are aware of your past union activities and create the impression that we are engaged in surveillance of your current union activities

WE WILL NOT threaten you with unspecified reprisals because you engage in union activities.

WE WILL NOT intimidate or harass you by singling you out in a group meeting for engaging in union activities.

WE WILL NOT change the location of your breaks in retaliation for engaging in union activities.

WE WILL NOT deny your requests for personal holidays because you or other employees engaged in union activities.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, at the maintenance employees' request, grant them the personal holidays which were denied in retaliation for engaging in union activities.

WE WILL restore the location of maintenance employees' breaks as they existed prior to December 15, 2015.

WE WILL remove from our files all references to any points and related disciplinary actions that we issued to employees under our attendance policies as a result of our denial of personal

holiday requests and WE WILL notify those employees in writing that this has been done and that the points or discipline will not be used against them in any way.

WE WILL rescind our changes to the location and length of maintenance employees' breaks, including by allowing employees to take breaks in the location previously permitted by us prior to employees engaging in union activities.

ARCHER DANIELS MIDLAND COMPANY (ADM)

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-143250 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.